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Human rights and transnational corporations and other business enterprises

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of his Special Representative on the issue of human rights and transnational corporations and other business enterprises, submitted in accordance with Human Rights Council resolution 8/7.

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Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

Summary

At its eighth session in June 2008, the Human Rights Council welcomed the policy framework for business and human rights proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and extended his mandate for another three years (see Council resolution 8/7). The mandate of the Special Representative was first established by the then Commission on Human Rights in 2005 in its resolution 2005/69.

The extended mandate of the Special Representative requires him to report annually to the General Assembly. The present report outlines the main components of the conceptual and policy framework identified in his report to the Human Rights Council (A/HRC/8/5). The framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The report also outlines the anticipated work streams to be undertaken by the Special Representative in implementing his extended mandate from the Human Rights Council and contains a brief update of relevant activities undertaken by the Special Representative since completion of his most recent report.

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I. Introduction

1. At its eighth session in June 2008, the Human Rights Council welcomed the report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and extended his mandate for a further three years (see Council resolution 8/7). The original mandate had been adopted by the then Commission on Human Rights in its resolution 2005/69.

2. The new mandate of the Special Representative requires him to report annually to the General Assembly. In view of the short period of time between the extension of his mandate in June 2008 and the deadline for submission of his report to the Assembly in August 2008, the present report is brief. It outlines the main components of the conceptual and policy framework the Special Representative presented to the Human Rights Council (in A/HRC/8/5), which the Council welcomed in its resolution 8/7, outlines the anticipated work streams to be undertaken by the Special Representative in implementing his extended mandate and summarizes some of the main activities of the Special Representative since the eighth session of the Human Rights Council.

II. Protect, respect and remedy framework

3. The Special Representative's mandate was established in the wake of the deeply divisive debates in the Commission on Human Rights concerning the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, approved by the Subcommission on the Promotion and Protection of Human Rights in 2003 (E/CN.4/Sub.2/2003/12/Rev.2). Granting that the document contained useful elements and ideas, the Commission nevertheless concluded that the draft norms had no legal standing (see Commission on Human Rights decision 2004/116) and it took no action on the proposal. Instead, in 2005, the Commission adopted the Special Representative's wide-ranging mandate to, inter alia, identify and clarify existing standards, elaborate on the role of States and share his views and recommendations on how to strengthen the protection of human rights against corporate-related abuse (see Commission resolution 2005/69).

4. In the past three years, the Special Representative has conducted no fewer than 14 multi-stakeholder consultations on five continents; conducted more than two dozen research projects, some with the assistance of global law firms and other legal experts, non-governmental organizations (NGOs), international institutions and committed individuals; produced more than 1,000 pages of documents; received some 20 submissions; and reported once to the Commission on Human Rights and twice to the Human Rights Council.[1]

5. One common theme ran throughout the extensive consultative process. Despite differences among the stakeholder groups, every one of them expressed the urgent

[1] All documentation produced by and for the mandate, including the Special Representative's reports to the Commission on Human Rights and the Human Rights Council, is posted on his website: http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative. The Special Representative is grateful to the Business and Human Rights Resource Centre for hosting the site.

need for a common framework of understanding of the complex business and human rights challenges, a foundation on which thinking and action could build in a cumulative fashion.

6. Accordingly, in 2008, the Special Representative submitted a strategic policy framework to the Human Rights Council[2], organized around the three fundamental principles of protect, respect, and remedy: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The State duty to protect is critical because it lies at the very core of the international human rights regime; the corporate responsibility to respect is essential because it is the basic expectation society has of business; and access to remedy must form part of any successful strategy because even the most concerted efforts cannot prevent all abuse.

7. Under each of the framework's three principles, the Special Representative surveyed various ways in which the principles are being and can be operationalized by States and companies, through changes in national laws, regulatory policies, international mechanisms and voluntary initiatives.[3]

8. The first of the three principles of the framework brings the State back into the business and human rights equation. It is often stressed that Governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. But in the area of business and human rights, the Special Representative questioned whether Governments have gotten the balance right. His research and consultations indicated that most Governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual (often weak) institutional box, and it is kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance. That is roughly equivalent to a company setting up a corporate social responsibility department in isolation from its core business operations. Inadequate domestic policy coherence is replicated internationally.

9. The main recommendation of the Special Representative to States is that human rights concerns in relation to business need to be expanded beyond their currently narrow institutional confines. Governments need to ensure that human rights compliance becomes part of defining an ethical corporate culture, and they need to consider human rights impacts when they sign trade agreements or investment treaties, especially when they provide export credit or investment guarantees for overseas projects in any context where the risk of human rights challenges is known to be high.

10. The second component of the framework is the corporate responsibility to respect human rights, meaning, in essence, to do no harm. In addition to legal compliance, companies are subject to what is sometimes called a social licence to operate, that is, prevailing social expectations. In fact, the corporate responsibility to respect human rights is recognized in virtually every voluntary initiative companies have adopted, and it is stipulated in several non-legally binding (so-called soft law) instruments. It is the baseline expectation for all companies in

[2] A/HRC/8/5 and Add.1 and 2.

[3] For full explanation of the different components of the framework, see A/HRC/8/5.

all situations. As it is the baseline, a company cannot compensate for damage caused to human rights in one place by performing good deeds elsewhere. And doing no harm is not merely a passive responsibility for firms, but may entail positive steps. For example, a workplace anti-discrimination policy might require a company to adopt specific recruitment and training programmes.

11. Yet how do companies know that they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? In fact, relatively few companies do. Accordingly, the Special Representative has proposed a due diligence process for companies to manage the risk of human rights harm with a view to avoiding it. The scope of that process requires that companies pay attention to three factors: the country context in which the business activity takes place; a company's own activities; and whether it might contribute to abuse through a relationship connected to its activities, such as with business partners, suppliers or State agencies.

12. Access to remedy is the third principle. Even where institutions operate optimally, disputes over adverse human rights impacts of companies are likely to occur, and victims will seek redress. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped, from the company level up through national and international spheres. The Special Representative has noted some desirable changes for improving access to justice, including through strengthened judicial capacity with regard to complaints against business. He has identified criteria of effectiveness for non-judicial grievance mechanisms, based on which he has suggested ways of strengthening some existing mechanisms. He has underlined that providing effective access to remedy is part of both the State duty to protect and the corporate responsibility to respect, and that in relation to the latter, mechanisms provided at the company level must be based on direct or mediated dialogue rather than on self-adjudication.

13. The Human Rights Council responded favourably to the proposed framework. Resolution 8/7, welcoming the report and extending the mandate of the Special Representative, had 43 co-sponsors and was adopted without a vote. The adoption of the resolution marks an important expression of support by the authoritative United Nations human rights body for a new way forward through which all parties can achieve greater conceptual coherence and policy guidance in the business and human rights domain.

14. The Special Representative's three-pillar framework has also been well received by a broad spectrum of stakeholders: many NGOs, including Amnesty International and the Centre for Human Rights and Environment, based in Argentina; major global business associations, such as the International Chamber of Commerce and the International Organization of Employers; and a large group of socially responsible investors such as the Social Investment Forum and the Business Leaders Initiative on Human Rights, a group of 13 well-recognized global firms whose aim is to find "practical ways of applying the aspirations of the Universal Declaration of Human Rights within a business context".[4]

[4] All submissions and comments received by the Special Representative concerning the three-pillar framework are posted on his website at http://www.business-humanrights.org/Documents/RuggieHRC2008.

III. Next steps

15. Under the extended mandate, the Human Rights Council has tasked the Special Representative with operationalizing the framework with a view to providing more effective protection to individuals and communities against human rights abuses by, or involving, transnational corporations and other business enterprises. Specifically, the mandate asks the Special Representative:

(a) To provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation;

(b) To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;

(c) To explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;

(d) To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children;

(e) To identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact;

(f) To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council;

(g) To promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings.

16. At the time of writing (August 2008), the Special Representative was still consulting with stakeholders, experts and other relevant partners about how best to pursue the different components of his renewed mandate. The following paragraphs outline the Special Representative's preliminary plans and ideas for how to move the mandate forward, although it should be understood that they are subject to change based on further reflection.

17. To advise him on all aspects of his work in the next phase, the Special Representative is planning to convene a high-level leadership group from diverse sectors and regions to provide ongoing strategic and substantive advice.

A. State duty to protect

18. In his most recent report to the Human Rights Council, the Special Representative drew attention to the fact that the human rights regime cannot possibly be expected to function as intended in the unique circumstances of conflict zones, which are typically characterized by sporadic or sustained violence, governance breakdown and the absence of the rule of law. It is in such circumstances that the most egregious human rights abuses occur, including those related to corporations. The Special Representative concluded that specific policy innovations are required to prevent corporate abuse in conflict zones, yet many States have done little to grapple with those difficult issues.

19. The Special Representative proposes to explore the policy options available to assist States in dealing with such situations. To be relevant and successful, the work will require a consultative process involving developed and developing States; States that have recent experience of conflict within their borders and those that engage, through peacekeeping or development assistance, in efforts to mitigate conflict and support peacebuilding.

20. The Special Representative hopes that a collaborative effort focused on conflict zones could enable the identification of a range of positive, supportive and/or collaborative policies and tools which both home and host States could use to avoid or mitigate companies contributing to conflict, so that companies may be a positive force for peacebuilding rather than a cause or stimulant of conflict.

21. Great interest has been expressed by Government representatives, legal practitioners, companies and civil society with regard to the work of the Special Representative on investment agreements and human rights. Regional consultations are being scheduled in Peru and South Africa to follow up on consultations held in London in May 2008 (see paras. 31-34 below). These consultations will provide the Special Representative with ideas and suggestions on the best ways to address the issues identified in the March 2008 research paper published by the Special Representative and the International Finance Corporation focusing on the implications for States in meeting their duty to protect arising from private or public bilateral investment treaties and host Government agreements.[5] The Special Representative is also commissioning work to determine the scope and content of a possible future project on trade-related issues.

22. In line with the statement of the Special Representative in his 2008 report that Governments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business, the Special Representative intends to further explore the ways in which existing corporate law and related principles are being used to help improve corporate behaviour with respect to human rights, as well as provide guidance to States on the potential for regulatory reforms, where appropriate. In addition, a number of issues related to victims' access to formal judicial mechanisms are also being explored (see para. 24 below).

[5] "Stabilization clauses and human rights", a research project conducted for the International Finance Corporation and the Special Representative of the Secretary-General on business and human rights, March 2008: available at http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf.

B. Corporate responsibility to respect

23. The Special Representative is embarking on a process to elaborate a set of guiding principles on the scope and content of the corporate responsibility to respect human rights, including due diligence requirements and the related accountability measures. To ensure that broad and expert perspectives inform the development of the principles, the Special Representative plans to ensure multifaceted, multi-stakeholder consultation. It will comprise ongoing strategic and substantive advice from the high-level leadership group, and contributions from a series of multi-stakeholder consultations.

C. Access to remedies

24. The third pillar of the framework is access to remedies. The Special Representative's most recent report to the Human Rights Council highlighted the need for improved access to remedies through both judicial and non-judicial mechanisms. Under his new mandate, he will examine in greater depth existing barriers to access to judicial remedy at the domestic and transnational levels.

25. With regard to non-judicial mechanisms, the Special Representative will advance two lines of work. The first, focusing on existing non-judicial mechanisms, builds on the observation in his report to the Human Rights Council that a significant obstacle to accessing non-judicial grievance mechanisms is the lack of awareness as to where they are located, how they function and what supporting resources exist (A/HRC/8/5, para. 102). In discussions with organizations that host grievance mechanisms, it has become apparent that the lack of information about such mechanisms is a barrier to learning about different models of dispute resolution; which work best in what circumstances and why; the outcomes and settlements different approaches are producing; and what lessons those experiences may hold for developing policies to prevent disputes in the first place.

26. To help redress the information deficit, the Special Representative has initiated a collaboration with interested organizations to establish an international, interactive web-based forum, known as a "wiki". The forum will enable anyone with Internet access to find, contribute to or comment on information about grievance and dispute resolution mechanisms around the world; how they work; the expert human rights, mediation, legal and other resources that can support their effective use; and the learning they offer. It will be possible to post information in all official United Nations languages and in others as well.

27. Updates on the initiative will be posted on the Business and Human Rights Resource Centre website, where the launch of the wiki will also be announced (http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative). It is the Special Representative's strong hope that individuals and organizations from all States and sectors, whether from business, civil society, Government, academic, legal, mediation or other backgrounds, will engage in the online community, refer others to it and help collectively address the information barrier to effective remedy and dispute resolution in the business and human rights area.

28. The second strand of work on non-judicial grievance mechanisms will look at gaps in the patchwork of existing grievance mechanisms, both performance and institutional gaps. To that end, a multi-stakeholder consultation will be organized for

the mandate in November in collaboration with Oxfam USA. The aim will be to stimulate new thinking and rigorous debate around the most promising models for non-judicial grievance mechanisms that could add value to what currently exists. From the debate, as well as his wider, ongoing discussions with all stakeholder groups, the Special Representative hopes to gather some options and recommendations to put to the Human Rights Council and General Assembly in 2009, in line with his mandate.

29. In that context, the Special Representative continues also to collaborate with other relevant organizations at the national, regional or international level, including with national human rights institutions. He warmly welcomes recent discussions of business and human rights issues at meetings of national human rights institutions in Geneva, Copenhagen and Kuala Lumpur, and looks forward to benefiting from continued collaboration.

IV. Update on the activities of the Special Representative

30. Since finalizing his report to the Human Rights Council in March 2008, the Special Representative has addressed a number of organizations and stakeholders of strategic and substantive importance to his mandate. Copies of all speeches and statements given by the Special Representative are accessible on his website http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.

31. On 17 May 2008, the Special Representative delivered the keynote address at the annual meeting of the International Law Association in London. The remarks summarized the work of the mandate and the three-pillar framework, and spelled out the reasons why he did not recommend an international legal instrument for business and human rights at this point in time. The meeting attracted hundreds of international lawyers from numerous countries. During the meeting, a panel discussed the Special Representative's work on investment and human rights.

32. On 22 May 2008, the Special Representative gave a public address at Chatham House in London entitled "Next Steps in Business and Human Rights". The event was co-hosted by the Confederation of British Industries and the Business and Human Rights Resource Centre.

33. Also on 22 May 2008, the Special Representative, in conjunction with the International Finance Corporation, held the first multi-stakeholder consultation on investment agreements and human rights. The consultation aimed to discuss the findings of the research paper on stabilization clauses and human rights, a joint project between the International Finance Corporation and the Special Representative. The consultation was attended by legal practitioners, international organizations including representatives from the Organization for Economic Cooperation and Development (OECD), the United Nations Commission on International Trade Law (UNCITRAL), and the Energy Charter secretariat, as well as individuals from industry, academia and civil society. There was broad consensus that the paper published by the Special Representative provided an excellent platform for moving forward the discussion on an important topic related to both the duty to protect and the responsibility to respect. A summary report from the consultation will be posted on the website of the Special Representative.

34. On 23 May, the Special Representative addressed a workshop convened by Global Witness and the British Institute of International and Comparative Law. The workshop was devoted to the theme "Protect, respect and remedy: a discussion of John Ruggie's business and human rights framework — strategies for moving forward".

35. On 24 June 2008, the Special Representative gave the keynote address at the annual meeting of the OECD National Contact Points in Paris. While visiting OECD, the Special Representative also spoke at a conference held jointly by OECD and the International Labour Organization (ILO) on international labour standards, and met with representatives of the OECD Investment Committee and Development Assistance Committee to explore overlapping interests and possible ways of collaborating.

36. Also on 24 June 2008, a representative of the Office of the United Nations High Commissioner for Human Rights (OHCHR) gave a briefing on behalf of the Special Representative to the seventh annual inter-committee meeting of United Nations treaty bodies in Geneva about the framework and its relevance to the work of the treaty bodies. The briefing followed a presentation given by the Special Representative to the sixth annual inter-committee meeting in June 2007 outlining the findings of a major research project mapping State obligations under the seven core human rights treaties to regulate and adjudicate corporate activities, based on reports and observations from the seven treaty bodies.[6] The Special Representative intends to continue his engagement and dialogue with the treaty bodies, including through interaction with representatives of the treaty bodies during their annual meetings.

37. During the period from 23 to 27 June 2008, a member of the Special Representative's team addressed the human rights advocacy and business programme in Manila, a capacity-building programme for community advocates held in partnership with the diplomacy training programme of the University of the Philippines Institute of Human Rights and Action for Economic Reform.

38. Following up on a previous statement made by the Special Representative to the United Nations Commission on International Trade Law (UNCITRAL) Working Group II (international arbitration and conciliation) in February 2008, the Special Representative was requested by the Secretary of the UNCITRAL secretariat to attend the plenary meeting of UNCITRAL, held in New York in June 2008. On 27 June 2008, the Special Representative, through a representative, made a statement to UNCITRAL regarding the importance of the principle of transparency in investor-State arbitration. Following debate among the member States, the Commission unanimously agreed that transparency should be the priority for the arbitration working group immediately following the termination of its current work on revising the commercial arbitration rules.

39. On 15 July, a member of the Special Representative's team attended the twentieth session of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights in Geneva, and gave a panel presentation on the current and potential role of national human rights institutions in the area of business and human rights. In follow-up, an envoy of the

[6] A Summary of the key findings and examples of the seven treaty-specific reports prepared by the Special Representative is contained in A/HRC/4/35/Add.1.

Special Representative attended a meeting of various national human rights institutions in Copenhagen on 1 and 2 July, hosted by the Danish Institute for Human Rights, which focused on the possibility of establishing a working group on business and human rights, under the International Coordinating Committee.

40. From 28 to 31 July 2008, a member of the Special Representative's team attended the thirteenth annual meeting of the Asia Pacific Forum of National Human Rights Institutions in Kuala Lumpur. The representative assisted the Advisory Council of Jurists as it considered the topic of human rights and corporate social responsibility as requested by the Forum. In its preliminary recommendations to the Forum, the Council welcomed the Special Representative's three-pillar framework and suggested that national human rights institutions use it as a basis for their work on business and human rights.

V. Conclusion

41. **The Special Representative looks forward to his dialogue with the General Assembly this year and in the future. The business and human rights agenda is enormously complex and much hangs in the balance: the rights of individuals to enjoy lives of dignity, the role of business in achieving economic development and the social sustainability of globalization itself. The Special Representative believed, from the outset of his mandate, that progress will be achieved only if actions are based on careful analysis and broad social and political support. Accordingly, in planning the next phase of his work, he fully intends to continue to employ the methodology that has served the mandate so well to date: objective research, inclusive consultations and the engagement of a wide range of actors whose expertise and influence can turn principles into practice.**